SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 554

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND MUTUAL BROADCASTING SYSTEM, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

JOHN T. CAHILL,
DAVID M. WOOD,
THOMAS H. MIDDLETON,
Counsel for Appellants.

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No. 554

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA AND THE FEDERAL COMMUNICATIONS COMMISSION,

Defendants;

MUTUAL BROADCASTING SYSTEM, INC.,

Intervenor.

JURISDICTIONAL STATEMENT.

Pursuant to Rule 12 of the Supreme Court of the United States, the petitioners in support of the jurisdiction of the Supreme Court to review the judgment, order and decree in question, respectfully represent:

I.

Statutory Provisions Believed to Sustain the Jurisdiction.

1. Section 402(a) of the Communications Act of 1934, United States Code, Title 47, Section 402(a) (47 U. S. C. A., Sec. 402(a)).

2. The Urgent Deficiencies Appropriation Act, October 22, 1913, Chapter 32 (38 Stat. 219, 220; United States Code, Title 28, Section 47(a); 28 U. S. C. A., Section 47(a)). This Act provides that an appeal may be taken directly to the Supreme Court of the United States from decrees made by statutory three-judge courts granting or denying injunctions against the operation of orders of the Interstate Commerce Commission.

Said Section 402(a) of said Communications Act makes the aforesaid section of the Urgent Deficiencies Act applicable to orders of the Federal Communications Commission.

II.

Order of the Federal Communications Commission, the Validity of Which Is Involved.

On May 2, 1941, the Federal Communications Commission made the following order:

"Commission Order in Docket No. 5060.

"In the Matter of the Investigation of Chain Broadcasting.

"May 2, 1941.

"WHEREAS, The Commission on March 18, 1938, by Order No. 37, authorized an investigation 'to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity;'

"WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and 'to make reports to the Commission with recommendations for action by the Commission;'

"WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

"WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

"WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

"NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:

"3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization [1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. See Chapter VII, A, 1.

"3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

"3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided,* That a contract arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the com-

[1] The term 'network organization,' as used herein, includes national and regional network organizations. See Chapter VII, J.

mencement of such one-year period. See Chapter VII, B.

"3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

"3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

"3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control[2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage,

[2] The word 'control,' as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks."

power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

"3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

"3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

"It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. SLOWIE,
Secretary."

with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.'

T. J. SLOWIE,
Secretary."

III.

Date of Decree and of Application for Appeal.

The final decree of the statutory three-Judge Court dismissing appellant's complaint on the merits is dated November 16, 1942, and was entered herein on November 16, 1942.

The application for this appeal was made on November 25, 1942.

IV.

Nature of the Case.

Pursuant to Section 402(a) of the Communications Act of 1934 (47 U. S. C. A. Section 402(a)) and Section 209 of the Judicial Code (28 U. S. C. A. Section 45), a complaint was filed in the District Court of the United States for the Southern District of New York on October 30, 1941, invoking the Court's jurisdiction under said Section 402(a) and subdivision 28 of Section 41 of Title 28, U. S. C. A., to set aside, annul and suspend the said Order of the Federal Communications Commission made on May 2, 1941, as amended October 11, 1941.

A three-judge statutory court was convened pursuant to the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913, Chapter 32 (38 Stat. 220; 28 U. S. C. A. Section 47.) Appellants moved for a temporary injunction and appellees moved to dismiss the complaint or in the alternative for summary judgment. The motions were argued in the District Court before three judges and a final decree was entered on the 21st day of February, 1942, dismissing the suit for want of jurisdiction, one judge dissenting.

Upon motion of appellants, the District Court granted a stay of the enforcement of said Order of the Federal Communications Commission until May 1, 1942, or the argument of the appeal to the Supreme Court of the United States, whichever were earlier.

An appeal having been taken to the Supreme Court of the United States pursuant to the provisions of said Urgent Deficiencies Appropriation Act and said Section 402(a) of the Communications Act of 1934, the Supreme Court of the United States on June 1, 1942 reversed said final decree dismissing the suit for want of jurisdiction and remanded the cause for further proceedings.

Appellees' motions to dismiss the complaint or in the alternative for summary judgment, together with appellants' motion for a temporary injunction, were argued in the District Court before said three judges on October 8, 1942, and a final decree was entered on November 16, 1942, dismissing the complaint on the merits. At the same time the District Court entered an order granting a stay of the enforcement of said Order of the Federal Communications Commission until February 1, 1943, or the argument of the appeal in the Supreme Court of the United States from the decree dismissing the complaint on the merits, whichever is earlier.

V.

Decisions Believed to Sustain Jurisdiction.

The following decisions are believed to sustain jurisdiction of this appeal:

Rochester Telephone Corp. v. *United States, et al.*, 307 U. S. 125 (1939);

American Telephone & Telegraph Co. v. *United States*, 299 U. S. 232 (1936);

National Broadcasting Company, Inc. et al. v. *United States, et al.*, 316 U. S. 447 (1942);

Columbia Broadcasting System, Inc. v. *United States, et al.*, 316 U. S. 407 (1942).

VI.

Grounds Upon Which It Is Contended That the Questions Involved in This Appeal Are Substantial.

The Order of the Federal Communications Commission which appellants seek to set aside in this suit deals with certain contractual relationships between approximately 600 standard broadcast stations in the United States and the network organizations which supply programs to such standard broadcast stations and pursuant to which nation-wide network radio programs have heretofore been distributed to the nation. The Order does not seek to affect these contracts directly, but does so indirectly by providing that no license shall be granted to stations having contracts with network organizations containing any of the provisions proscribed by the Order. It is contended by appellants that the proscribed provisions are essential to their nation-wide network broadcasting.

Among the contentions raised by appellants on this appeal are the following:

1. The construction of the Federal Communications Act of 1934 advanced by appellees and by the statutory three-judge district court to sustain the power of the Federal Communications Commission to promulgate the Order is repugnant to Section 326 of the Communications Act of 1934, the First Amendment to the Constitution of the United States and Article I, Section 1 of the Constitution of the United States.

2. The Order is an attempt on the part of the Federal Communications Commission to regulate network broadcasting pursuant to the Anti-Trust laws in violation of the clear provisions and intent of the Communications Act of 1934 and in derogation of the power of the Department of Justice and the Federal courts to deal with such matters.

3. The Order bears no reasonable relation to the standard of public interest, convenience and necessity adopted by the Communications Act of 1934 and is arbitrary and capricious.

4. The disposition of this suit by the statutory three-judge district court upon the basis of the record made before the Federal Communications Commission and without according appellants a trial in the District Court upon the reasonableness of the relation of the Order to the standard of public interest, convenience and necessity adopted by the Communications Act of 1934, is not in accordance with the principles covering the judicial review of such an order as heretofore laid down by the Supreme Court of the United States.

Appellants respectfully submit that the United States Supreme Court has jurisdiction of this appeal.

A copy of the opinion delivered by the District Court upon the rendering of the decree dismissing the suit for

want of jurisdiction, together with a copy of the dissenting opinion of Judge Bright, is attached to this statement as Appendix A. A copy of the opinion delivered by the District Court, together with its findings of fact, conclusions of law and decree granting plaintiffs' motion for a stay pending appeal to the Supreme Court of the United States from the decree dismissing the suit for want of jurisdiction, is attached to this statement as Appendix B. A copy of the opinion delivered by the Supreme Court of the United States reversing the decree of the District Court dismissing the suit for want of jurisdiction, together with the dissenting opinion of Mr. Justice Frankfurter, is attached to this statement as Appendix C.* A copy of the opinion delivered by the District Court upon the rendering of the decree dismissing the complaint on the merits and which is sought to be reviewed, together with the order dismissing the complaint, the findings of fact and the decree granting a temporary restraining order pending this appeal, is attached to this statement as Appendix D.

Respectfully submitted,

JOHN T. CAHILL,
Solicitor for National Broadcasting Company, Inc.;

DAVID M. WOOD,
Solicitor for Woodmen of the World, Life Insurance Society;

THOMAS H. MIDDLETON,
Solicitor for Stromberg-Carlson Telephone Manufacturing Company.

Dated, November 25, 1942.

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* (Clerk's Note:—The opinion of this Court is reported 316 U. S. 407 and is not reprinted in the Appendix.)

APPENDIX A.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY AND STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants*,

MUTUAL BROADCASTING SYSTEM, INC., *Intervener*.

Civil 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Interveners*.

Before L. Hand, C. J.; Goddard and Bright, D. JJ.

Upon motions before answer by the defendants under Rule 12 (b)(1) to dismiss for lack of jurisdiction the complaints in two actions brought under § 402 (a) of Title 47, U. S. Code, to enjoin and set aside certain regulations of the Federal Communications Commission.

John T. Cahill, for National Broadcasting Company.

Charles E. Hughes, Jr., for the Columbia Broadcasting System.

Telford Taylor and Thomas E. Harris, for the United States and the Commission.

Louis G. Caldwell, for the Mutual Broadcasting System, Inc., Intervener.

L. HAND, *C. J.*:

These actions were brought to declare invalid and set aside certain regulations originally promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941; in their final form they appear at the end of this opinion. After the actions were filed the Commission, on October 31, 1941, promulgated a further regulation in the form of a "minute", also appearing at the end of the opinion. Preparatory to the issuance of the regulations the Commission had held hearings at which nearly 9,000 pages of testimony were taken; among others whom it had invited to attend, were the two plaintiff "networks", which accepted and took part by introducing extensive evidence. When the regulations appeared, the "networks" brought the two actions at bar under § 402 (a) of Title 47, U. S. Code, to set them aside as beyond the powers of the Commission and as arbitrary, unreasonable and without basis in the evidence. Upon the complaints so filed and voluminous affidavits they then moved for a preliminary injunction against their enforcement *pendente lite*. In the action brought by the National Broadcasting Company, two "affiliated stations" have joined as parties plaintiff and the United States and the Commission were originally joined as defendants; in the action brought by the Columbia Broadcasting System it alone is plaintiff and the United States is the only defendant, but the Commission later intervened. A third "net work", the Mutual Broadcasting System, intervened as a defendant in both actions. The United States and the Commission have countered the plaintiffs' motions by motions, made before answer, to dismiss the complaints for lack of jurisdiction over the subject-matter under Rule 12 (b)(1), and for summary judgment under Rule 56 (b). The Mutual Broadcasting System has answered and joined in the motions of the other defendants. All these motions having come on before Judge Goddard, he assembled a court composed of three judges, to whom the hearing was transferred in accordance with the Act of October 22, 1913 (38 St. L. 219).

Since we are deciding that the District Court for the Southern District of New York has no jurisdiction over the subject-matter of the actions either as a court of three judges or of one, it will not be necessary to consider the merits; nevertheless we must say something about the background of the regulations in order to make our discussion intelligible. The business of broadcasting depends for its support principally, if not altogether, upon advertising. The broadcasting is done by "stations", each "station" selecting programs which it thinks will be popular, either spoken, sung or instrumentally performed in its own studio, or relayed to it by a "network" as will appear. Interjected among these programs, occur those fervid importunities of advertisers, upon the results of which the "station" must depend for its revenue. A single "station" dependent upon its own programs alone would be very expensive to operate, and its income would be small; especially if, as has become customary, it were to add to its advertising programs what are called "sustaining programs", which are not paid for, but which are thought to give a general popularity to the "station". These circumstances have long since resulted in the creation of "networks" of the kind with which the actions at bar are concerned; that is to say, in a widespread system of contracts of a single company with separate "stations" scattered all over the Union and known as "affiliates". The plaintiffs, National Broadcasting Company and the Columbia Broadcasting System, are two such "networks"; they own and operate broadcasting "stations" of their own, but, although they depend in part upon these as outlets, their principal reliance is upon their "affiliates". They originate a great variety of programs—usually in a studio of one of their owned "stations"—which they transmit by telephone to the "affiliates" for broadcasting. The audience of such a "network" in this way becomes the aggregate of the audiences of its "affiliated stations", and this enables it to charge so much higher prices for advertising than the "affiliates" could charge alone, that both they and the "network" can divide the returns to their common advantage.

There are four such national "networks", two owned by the National Broadcasting Company (one of which we are told it has disposed of since these actions were begun), another by the Columbia Broadcasting System, and the fourth by the Mutual Broadcasting System, which has intervened because it feels itself aggrieved by the practices against which the regulations in suit were directed.

Every broadcasting "station" must have a license and the Federal Communications Commission alone has power to grant, refuse, revoke, renew or modify licenses. The Commission also has "authority to make special regulations applicable to radio stations engaged in chain broadcasting", § 303 (i). By virtue of these powers it assumed to promulgate the regulations now challenged, all of which it will be observed, are no more than declarations of the conditions upon which the Commission will in the future issue licenses to "stations". The defendants' motions to dismiss the complaints are based upon the theory that these regulations are not "orders" within the meaning of § 402 (a), and that therefore this court has no jurisdiction over them; indeed, that they are not "orders" of any sort, but merely announcements of the course which it will pursue in the future, whenever an "affiliated station" applies for a new license, or for the renewal of an existing one. To this the "networks" reply that the regulations had an immediate effect; that they not only announced what would be the future practice of the Commission, but presently adjudicated the invalidity of the contracts between themselves and their "affiliates"; and that they have in fact already caused serious losses, because a number of "affiliates" have declared that they will be obliged to break their contracts when their licenses are renewed, and have thus made it impossible for the "networks" to accept large and valuable advertising contracts.

We do not think that we need commit ourselves generally as to what "orders" are reviewable under the Act of October 22, 1913 (38 St. L. 219), which § 402 (a) of Title 47, U. S. Code, incorporates by reference as the measure of our jurisdiction. So far as we have found, the Supreme

Court has never declared that that statute authorizes review of any decision of an administrative tribunal which neither directs anyone to do anything, nor finally adjudicates a fact to exist upon which some right or duty immediately depends. We agree that it is no answer that the decision challenged is "legislative" in character, (*The Chicago Junction Case*, 264 U. S. 258, 263), and, as we have just implied, it is enough if it authoritatively determines the existence of a fact that at once sets in execution some sanction, though the decision itself be not in form a command. *United States* v. *Baltimore & Ohio Railroad*, 293 U. S. 454; *Powell* v. *United States*, 300 U. S. 276; *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125; *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 408. (*Colorado* v. *United States*, 271 U. S. 153; *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382; and *United States* v. *Idaho*, 298 U. S. 105, though they are of the same kind, are scarcely controlling, because they turned upon §1(20) of the Interstate Commerce Act.) But decisions which are no more than announcements of future administrative action have never, so far as we can find, been treated as within this statute. That does not necessarily imply that a person presently injured is without any remedy when the threatened action would be unlawful; the situation then may present all the elements upon which equity will intervene in ordinary course. *Shields* v. *Utah Idaho Central Railroad Company*, 305 U. S. 177. It may be that the plaintiffs at bar could bring such actions in equity; at least it does not appear that recourse to them is positively forbidden, as was for example the case in *Venner* v. *Michigan Central*, 271 U. S. 127. But even so they would not be the actions at bar, which can be brought only under the statute, since otherwise the United States cannot be sued, or the Commission sued in this district, assuming that it was in any event possible to join it at all. Such actions would have to depend jurisdictionally upon the same facts as any other action against a public officer who threatens to do an unlawful act.

We should therefore have a great deal of doubt whether the regulations could in any view be regarded as "orders" which we could review under the Act of October 22, 1913 (38 St. L. 219), if the case came to us under the statute *in vacuo*. It does not, because, although, as we have said, § 402 (a) incorporates it by reference, those orders are excepted which are mentioned in the parenthesis: to wit, all orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license". Relief from such orders is provided in § 402 (b), (c), (d), (e) and (f); it is by appeal to the Court of Appeals of the District of Columbia, and it is to be heard upon the record made at the hearing of an application by the Commission. The procedure upon such appeals is in substance the same as that which has now become standard for the review of the decisions of administrative tribunals in adversary proceedings. Consequently, if any of the "affiliates" of the plaintiff "networks" should hereafter apply for a renewal of their licenses; and if, as we assume it will, the Commission adheres to its regulations, the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing. We have seen, however, that the regulations are nothing more than a declaration—or if one chooses, a threat—by the Commission that it will impose those conditions upon any renewal of a license in the future. No change is made in the status of "affiliates" meanwhile; their existing contracts with the "networks" remain enforceable; nor has the Commission given any evidence of an intention to use them as the basis for a revocation of existing licenses under § 312 (a). On the contrary, the "minute" we have mentioned commits it to a contrary course. Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission

has power to impose the conditions mentioned in the regulations when a "station" applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. Whatever may ordinarily be the proper scope of the word "order" in the Act of October 22, 1913 (38 St. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such "orders".

To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel the Commission to raise the issues immediately, as by a revocation proceeding under § 312 (a); even so it should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action against the United States and the Commission. We need not decide the point, however, because the "minute" we have quoted offers equivalent relief without risk to any "station" which may challenge the regulations. Next, the plaintiffs say that they may not be able to raise the issue in a proceeding for the renewal of a license, because the "affiliated stations" may fear to incur the Commission's displeasure. As to the National Broadcasting Company this is plainly untrue because two of its "affiliates" have joined it as plaintiffs. As to the Columbia Broadcasting System, its complaint, read most favorably, does perhaps allege that none of its "affiliates" will challenge the regulations when their licenses expire; at any rate, to avoid any doubts, we shall so assume, little as that seems likely to be the case. We may do so, because the issue is irrelevant anyway, for the plaintiff "networks" have an adequate remedy under § 402 itself. They allege—and there seems to be no question about it—that their interest will be adversely affected by the enforcement of the regulations; if so, they can appeal to the Court of Appeals of the District from any order imposing unlawful conditions.

upon an "affiliate's" license. § 402 (b) (2). It is true that the section does not in terms provide that they shall also be heard in the proceeding before the Commission under § 309 (a) for the "renewal or modification of a station license;" but the Commission has itself answered that objection by § 1.102 of its regulations which permits intervention. An unreasonable refusal of the privilege so offered would appear to be a good objection on appeal under § 402 (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal. At any rate until the Commission shows some disposition to deny them a fair hearing in a proceeding for renewal of an "affiliate's" license, we are not to assume that it will do so. And even if that should appear, the resulting right of action, if any, would not, as we have said, be in this court or against the United States. For the foregoing reasons the complaints will be dismissed for lack of jurisdiction over the subject-matter.

We do not understand that any findings of fact are proper under Rule 52 (a), which provides for such findings only in "actions tried upon the facts without a jury." It is true that the plaintiffs have moved for a preliminary injunction, and that the rule also requires findings "in granting or refusing interlocutory injunctions;" but we are not "refusing" any injunction. Once the complaints are dismissed for lack of jurisdiction, the motions become moot and we shall not pass upon them at all. We are therefore entering judgment in each action without findings.

Complaints dismissed for lack of jurisdiction.

LEARNED HAND,
HENRY W. GODDARD.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants*.

MUTUAL BROADCASTING SYSTEM, INC., *Intervener*.

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COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Interveners*.

BRIGHT, *D. J.*:

As I read the opinion of my brothers, they would dismiss for want of jurisdiction because nothing reviewable has been done, and that even after a license is denied, the only review thereof would be by appeal to the Court of Appeals in the District of Columbia.

By Section 402-a of the Communications Act of 1934, we have jurisdiction to enjoin, set aside, annul or suspend an order of the Commission, except where it grants or refuses an application for a construction permit, for the granting, renewal or modification of a station license, or suspending a radio operator's license. These excepted matters can be reviewed only by appeal to the Court of Appeals aforesaid. This order, in my opinion, does not come within any of the excepted provisions. No application has been or is here made for any such relief, and the order sought to be reviewed does not arise out of any such application.

There is no question in my mind that the order sought to be reviewed is one which, under the terms of Section 402-a, we have jurisdiction to enjoin. It is designated by the defendants as a "commission order". It has the usual mandatory clauses found in orders. It was by its terms obviously entered after an investigation made upon the Commission's own motion to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity. It promulgates certain regulations, an obvious and attempted exercise of the Commission's rule-making power. It is clearly an attempt to make rules because at the time there was nothing else before the Commission upon which it could or did act. All of these rules, or regulations as they are called in the order, relate only to standard broadcasting stations having contracts with a network organization, except rule 3.106, which relates to a license to be granted to a network organization having more than one station in a service area, and rule 3.107 which proscribes a broadcasting station affiliated with a network maintaining more than one network. These rules do not apply to stations not affiliated with any network. They apply only to contractual relations with networks, and in addition, prohibit the ownership by a network of more than one station in a specified service area and the ownership by any organization of more than one network. The order fixes as immediately the time when it shall become effective. In other respects it has all the earmarks of a final order.

That it was intended to be final is further evidenced by the Commission's report. It finds that the public interest "requires" the application of the regulations to stations affiliated with regional as well as with national networks. It affirms its powers to do so under Section 303-(i) of the Communications Act, and clearly reveals that it is exercising its rule making power when it queries whether the Commission can formulate into "general rules and regulations" the principles which it *intends* to apply in passing on individual applications. That its action is final is further emphasized by the statement, "We believe that the announcement

of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice. * * * The regulations we are now adopting are nothing more than the expression of the general policy *we will apply* in exercising our licensing power. The formulation of a regulation in general terms is an important aid to *consistency and predictability* and does not prejudice any rights of the applicant."

That it is exercising this rule-making power is further emphasized by another statement in its report, that Section 303-(i) gives the Commission specific power to make special regulations applying to radio stations engaged in chain broadcasting and that "no language could more clearly cover *what we are doing here*".

What it has done emphasizes more the finality of its order, which is an affirmative direction that thereafter no standard broadcasting station shall contract in terms prohibited, and ultimately puts an end to service by networks under contracts now existing. In fact, I think that the regulations are intended to effect existing contracts for the effective date of the order is deferred until November 15th, 1941, "with respect to existing contracts, arrangements or understandings". This certainly is not a statement that the regulations shall not apply to existing contracts; it is merely a postponement as to when the axe will fall.

The particular agreements prohibited are presently contained in most of the affiliation contracts of the two complaining networks. They state those provisions are essential to the proper and successful conduct of their business, and in deciding the question of jurisdiction, I believe we must assume this to be true. It is also shown by them, without contradiction, that between the time the regulations were promulgated and the commencement of these actions, not less than twenty-four broadcasting stations having affiliation contracts with NBC have cancelled their contracts as a result of the order in question, and not less than twenty-four others having such contracts, have served notice that they do not intend to abide by the terms of such contracts unless they are conformed to the Commission's order. Similarly, it is shown by the affidavits submitted by CBS

that some of the stations affiliated with it are refusing to renew their affiliation contracts, some are threatening to cancel or repudiate them, and some have already cancelled on the ground that the rules in question prohibit them. There is thus a present injury.

It is suggested that the plaintiffs must wait until the Commission has ruled upon the application of a broadcasting station for a renewal of its license. Can it be said that the Commission will change its rules, in view of the positive statement it has already made with reference thereto and above quoted? Must these networks await the idle ceremony of a denial of a license before any relief can be sought when it is perfectly obvious that no relief will be given? And what relief could they get if they did wait? The networks are not to be licensed, only the individual stations who make application. But it is said the networks could intervene and be heard. All that might be said or urged in their behalf has doubtless been communicated to the Commission in the three years between March 18, 1938, and May 2, 1941, when the investigation was going on. Must they march up the hill and down again, with the probability of being met with the statement that the Commission has given the matter due consideration and has done what it intends to abide by, as it has definitely said in its report? It is said, however, that by a minute adopted after these actions were brought, the Commission has manifested its intention to permit the networks to intervene and be heard upon the subject of the granting or denial of the license. That minute refers obviously only to a station, and insofar as it attempts to change the nature of the order sought to be reviewed or to obviate a review would be abortive. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433-452. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498-515.

This court has reviewed the rule-making power of this very Commission without being troubled by the question of jurisdiction. *A. T. & T. Co.* v. *U. S.*, 14 F. Supp. 121, affirmed 299 U. S. 232. That there can be a review of an order exercising the delegated legislative function of rate-

making and rule-making is admitted in *U. S.* v. *Los Angeles R. R.*, 273 U. S. 299, 309. In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, where bills were filed to enjoin orders prescribing methods of account, bookkeeping and reports, jurisdiction was not questioned in a court always jealous of its jurisdiction. In *Kansas City Southern Railway* v. *U. S.*, 231 U. S. 423, jurisdiction was again assumed of a petition to declare invalid and to enjoin regulations relative to accounting. In *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557-562, which involved a refusal of a suspension of a tariff, jurisdiction was assailed, at least until after a further remedy was sought; and it was there stated that where contention was made that the Commission had exceeded its statutory powers, courts have jurisdiction of suits to enjoin even if the plaintiff had not attempted to secure redress before the Commission. In the *Assigned Car Cases*, 274 U. S. 564, suits were brought to enjoin and annul an order which prescribed a rule governing the distribution of cars among coal mines after an investigation by the Interstate Commerce Commission of its own motion, and no question of right of review was raised. And in *A. F. of L.* v. *Labor Board*, 308 U. S. 401, 408, it was admitted that administrative determinations which are not commands may for all practical purposes, determine rights as effectively as the judgment of a court and may be re-examined by courts under particular statutes providing for the review of orders. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, suit was brought by a private school to restrain the enforcement of an Oregon statute which required primary education in public schools, and jurisdiction was sustained, Mr. Justice McReynolds writing that the suits were not premature, that the injury to the plaintiffs was present and very real and not a mere possibility in the remote future.

Dated: February 20, 1942.

JOHN BRIGHT,
U. S. D. J.

APPENDIX B.

UNITED STATES DISTRICT COURT, SOUTHERN DITRICT OF NEW YORK.

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants*

MUTUAL BROADCASTING SYSTEM, INC., *Intervener.*

This cause came on to be further heard at the February, 1942, term of this court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the status quo pending an appeal by the plaintiffs to the Supreme Court, for the reasons appearing in the Opinion, and Findings of Fact and Conclusion of Law, filed herewith, it is

ORDERED, ADJUDGED AND DECREED that until May first, 1942 or the argument of the appeal herein to the Supreme Court of the United States, whichever is earlier, the Federal Communications Commisison be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1942, and which are known as "Order in Docket No. 5060."

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J.

UNITED STATES DISTRICT COURT, SOUTHERN DITRICT OF NEW YORK.

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants*.

MUTUAL BROADCASTING SYSTEM, INC., *Intervener*.

FINDINGS OF FACT

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court—contrary to its said judgment—has in fact jurisdiction over the cause of action stated in the complaint; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from enforcement, if the conditions mentioned in the First Finding exist.

CONCLUSION OF LAW

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order

forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of May, 1942, whichever is earlier.

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J.

UNITED STATES DISTRICT COURT, SOUTHERN DITRICT OF NEW YORK.

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, *Defendants.*

MUTUAL BROADCASTING SYSTEM, INC., *Intervener.*

Civil Action No. 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*,

THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING COMPANY, INC., *Intervenors.*

Before L. Hand, C. J.; Goddard and Bright, D. JJ.

Per CURIAM:

The Commision is of course right in saying that we have decided that the plaintiffs have adequate protection out-

side of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. If so, the plaintiffs will not be adequately protected, and indeed they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding. Considering on the one hand that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and on the other that the Commission itself gave no evidence before these actions were commenced that the proposed changes were of such immediately pressing importance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiffs' favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the Supreme Court or the first day of May, 1942, whichever comes first. For any further stay the plaintiffs must apply to the Supreme Court itself, or to the Circuit Justice.

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J.

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APPENDIX C.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 16—178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Defendants*

Civil 16—179

COLUMBIA BROADCASTING SYSTEM, INC., *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Intervenors*.

Before L. HAND C. J., and GODDARD and BRIGHT, D. J. J.

On motions by the defendants for summary judgments dismissing the complaints herein two actions to "annul" certain regulations of the Federal Communications Commission and to enjoin the Commission from enforcing them.

CHARLES R. DENNY for the Commission.

CHARLES E. HUGHES, JR., for the Columbia Broadcasting System, Inc.

JOHN T. CAHILL for the National Broadcasting Company, Inc.

L. HAND, C. J.: These cases come before us a second time upon motions made by the defendants and the Mutual Broadcasting System—which has intervened—summarily to dismiss the complaints. The motions are made upon

the complaints, upon certain affidavits of the counsel for the Commission, upon the Commission's report and all the proceedings and evidence before it, and—we shall assume—upon the affidavits filed by the plaintiffs on their motions for preliminary injunctions. We shall not repeat the outlines of the controversy as set forth in our opinion in 44 Fed. Suppl. 688, and in that of the Supreme Court which reversed our judgments dismissing the complaints, 316 U. S. 407; but shall proceed directly to consider the points raised.

The most important of these is whether the Commission had power to pass the challenged regulations. Everyone agrees that in granting licenses under §309 of Title 47, U. S. Code, it must distribute the available wave-lengths so as to give greatest possible service, and that it must see to it that all applicants have the necessary technical ability to broadcast programs, that the stations are properly constructed and properly manned and do not interfere with other stations, and that the licensees are responsible, morally and financially. All these things and perhaps more, the Commission may regulate in discharge of its duty to promote the "public convenience, interest, or necessity." The regulations at bar have, however, nothing to do with these qualifications of a licensee; they are addressed, not to his ability to broadcast any programs which he may accept, but to his freedom to procure other programs than those to which by contract with, or by the control of, the "networks" he is limited; they touch, not how he shall broadcast, but how unrestricted he shall be in doing so. The plaintiffs say that, judged both by its history and by its language, the Act gave the Commission power to consider only the qualifications first specified, leaving outside any administrative control all arrangements by which a station secures its programs. They say that, although it is true that §313 makes "all laws * * * relating to unlawful restraints * * * applicable to * * * interstate or foreign radio communications," and that the courts have jurisdiction in this way to annul monopolies or restrictive contracts which affect broadcasting, only courts may do so; the Commission must disregard any such considerations when deciding whether to grant or refuse a license.

Section 303 defines the Commission's powers; its original was §4 of the Radio Act of 1927 which had eleven subdivisions, of which the first ten were the same as the first eleven of §303 except for a new subdivision ("g") introduced into §303. The eighth subdivision ("h") of §4 of the Radio Act (now the ninth ("i") of §303) gave the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcastng;" and on it the Commission particularly relied. The plaintiffs answer that it was meant merely to give the Commission control over the power and wave-lengths used by stations while connected with "networks" for "chain broadcasting." It was introduced by an amendment in the Senate and originally read that the Commission should have power, "when stations are connected by wire for chain broadcasting," to "determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting" The first clause of this amendment was indeed limited as the plaintiffs say; but the same was not true of the second clause. "Equitable radio service to the listeners" was a comprehensive phrase, read most naturally, it should include the best possible service compatible with such burdens as it was reasonable to impose upon the "networks" and their "affiliates"—"equitable," that is, in the sense that the interests of both sides were to be weighed. The fact that the occasion for the amendment appears to have been the Senate's apprehension that the "networks" might drown out "unaffiliated" stations, by no means circumscribed the scope of these words. This amendment finally emerged from Conference and was enacted, in the broad terms we have quoted; it would be altogether unwarranted to assume that it was intended to adopt the limited clause and to abandon the general one. We may start therefore with the strong probability that even in the Radio Act of 1927 the Commission had power by virtue of this sub-division to regulate "chain broadcasting" generally in the interest of "listeners."

The amendment to §303 of the Communications Act of 1934, that is, the interpolation of subdivision "g," confirms this interpretation. That subdivision reads as follows: "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." We can see no reason for confining the last clause to scientific or engineering problems; the purpose is apparent to give the Commission power to foster the industry in all appropriate ways. It is not clear that this was a new purpose; but if it was, it infused the powers already granted in the earlier act, broadening them in accord with the changed outlook—the power granted under subdivision "i" among the rest. The duty—for the power imposed a corresponding duty—to "encourage" the "larger" use of radio incidentally presupposed a power to prevent the frustration of the purpose so disclosed; we are not to construe the section as at war with itself. Therefore, even if §303 stood alone, we should hold that subdivision "i" granted power to the Commission to consider the effect upon a station's choice of programs of any controls or restrictions exercised by the "networks."

However, §303 does not stand alone. In addition to providing that all laws "relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade" should apply to "radio communications," §313 also took over from §15 of the Act of 1927 the provision that in actions brought under those laws or in proceedings to enforce orders of the Federal Trade Commission, whenever "any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may • • • decree that the license of such licensee shall • • • be revoked." As will be observed, revocation was here made a penalty like other penalties for monopoly or restraint of trade; the courts were not to use it as a means of compelling a licensee to furnish service free from unlawful restrictions, but to punish him for his past mis-conduct, the discretion accorded them being exercised according to the degree of his "guilt." This was in harmony with

the general scheme, for a court is not in good position to know how far a monopolistic or unfair competitive practice may interfere with "the larger and more effective use of radio in the public interest;" if any official was competent to do so, it was the Commission. Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had stopped there; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license.

However that may have been, §13 was amended in 1934 by adding a new clause, and the resultant §311, in addition to retaining the old language forbidding the restoration of a forfeited license, contained a new one providing that the Commission is "authorized to refuse such station license" whenever the applicant had been "finally adjudged guilty" by a "Federal court of * * * attempting unlawfully to monopolize radio communication * * * or to have been using unfair methods of competition." That power was certainly not to be used as a punishment; the Commission was not to overrule the court which had decided not to impose the penalty. Such a power would have been open to serious constitutional objection. What use then was the Commission to make of an adjudication of the applicant's "guilt"? Only, we submit, by considering it as evidence that, if granted a license, he would not use it for the "public convenience, interest, or necessity," i.e. that the grant of a license would not "encourage the larger and more effective use of radio in the public interest." The necessary implication from this was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee. Thus, whatever may have been the limits of the Commission's earlier powers, manifestly after 1934 they included a consideration of how far licensees might be improperly restricted in the exploitation of their licenses.

The plaintiffs do not concede even this, as we understand it, but in any event they insist that the exercise of any such power was conditioned upon an earlier adjudication by some court. We can see no reason to suppose (although apparently the Commission does not agree) that an applicant's violation of the statutes against monopoly and unfair competition, as such and alone, ever disentitles him to a license. It is indeed evidence relevant to his fitness for the reasons we have just given; but it is such only as any past conduct may be an earnest of what is to be expected in the future, and because a repetition would be prejudicial to the public interest. We construe this clause of §311 as going no further than to provide the Commission with an estoppel as to any facts which a court may have found; these may be taken as data for any rational inference that can be drawn from them relevant to the ultimate issue; but "guilt" as "guilt" is not the ultimate issue. Certainly that is the only effect which it is necessary to give the clause; there is not the slightest warrant for inferring that in the absence of an adjudication, the Commission may not determine what has been an applicant's past conduct, or may not consider how far, if repeated, it would interfere with the fullest use of his license. Whatever may be the mysteries enveloping an adjudication of "guilt" under the Anti-Trust laws which make that issue unfit to be entrusted as such to profane hands, the Commission is certainly peculiarly competent to appraise the effect upon broadcasting of restrictive or monopolistic practices, and is as competent to decide whether an applicant is likely to engage in them as it is to decide any of the other issues which come before it. The decision in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, is irrelevant; the only question decided was whether the injury suffered by an existing station was a material factor in licensing a new station.

The plaintiffs next challenge the regulations because they lay down general conditions for the grant of licenses instead of reserving decision until the issues arise upon an application. Such a doctrine would go far to destroy the power to make any regulations at all; nor can we see the

advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future. It may perhaps be true that a party, who had no notice of the hearings before the Commission and no opportunity to present his side, would be entitled, when applying for a license, to a reconsideration of those findings upon which the regulations rested. None of the plaintiffs at bar are in that position; they were amply advised of what the Commission proposed; they were invited to attend; all but the co-plaintiff "affiliates" of the National Broadcasting Company did so, put in whatever evidence they wished and were heard before the original regulations were passed, and again at the rehearing. They at any rate were accorded all the privileges they would have had if they had intervened in an application for a license. It would be futile after the expenditure of so much time and labor to hold that the proceedings were only advisory and concluded nobody; indeed, the mere fact that the regulations are "orders" reviewable under § 402(a) would seem to preclude such a conclusion. We do not understand the Supreme Court to mean that every minatory gesture of the Commission is reviewable under that section.

The next objection is that the Commission did not really find that the forbidden practices worked against "the public convenience, interest, or necessity," but that it rested upon its supposed duty to deny the applications of all who proposed to use their licenses in violation of the Anti-Trust laws. The Commission in one passage of its report does indeed seem so to have understood the statute, though it would scarcely be fair to say that it held as much; but, be that as it may, it did not base its action upon that theory. It made specific findings in the case of each regulation that the contract or the control which it forbade was against the public interest because it took away the stations' free choice without any corresponding advantage to the industry as a whole. Each regulation was a specific exercise of power, addressed to a particular practice which interfered with the most "effective use of radio in the public interest."

The only constitutional objections which we need consider are two: that the standard set by § 303 ("public con-

venience, interest, or necessity") is too vague; and that the regulations invade the privilege of free speech. Although the Supreme Court has twice at least upheld the standard when applied to the construction of stations or to the allocation of wave lengths (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, 138; (semble) *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428), the plaintiffs insist that it will not serve if used to regulate the business arrangements of a station. We are assuming that when so used it demands the widest practicable variety in the choice of programs available for broadcasting; that system which will most stimulate and liberate the ingenuity of those who purvey them to the public. There can be no doubt that, if the introductory clause of § 303 will bear that construction the test is definite enough—and indeed peculiarly adapted to the putative proficiency of the Commission in its field. Nor can we see why, when applied to the issue of the licensee's freedom from restraint, the test is not a fair gloss to be imposed upon the clause. It is impossible in a single rubric to specify all the occasions to which it will apply, and the effort at specification is usually abortive for they cannot all be foreshadowed. It is enough if the delegated power be so defined that a clue can be found in it for dealing with the several occasions which may arise. That seems to us to be the situation here.

The argument drawn from the First Amendment, as we understand it, is this. It is true that the regulations do not profess directly to control what programs the stations may broadcast; but they do so indirectly. They do this by forbidding them to make the forbidden contracts with "networks" even though they believe that these will bring them better programs than they can get in any other way; and it is not necessary for a law directly to control the substance of an utterance for it to invade the right of free speech. We agree that the regulations might be invalid though they do not prohibit programs on the basis of their contents; they do fetter the choice of the stations; absolutely free choice would include the privilege of deciding that

they preferred the opportunities open to them under the "networks" contracts to those which would be otherwise available. The Commission does therefore coerce their choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects, i.e. the interests, first, of the "listeners," next, of any licensees who may prefer to be freer of the "networks" than they are, and last, of any future competing "networks." Whether or not the conflict between these interests and those of the "networks" and their "affiliates" has been properly composed, no question of free speech can arise.

The last question upon the merits is whether the Commission's findings are so plainly without support in the evidence as to be "arbitrary or capricious," § 402(e); that is, whether the regulations are certain not to promote the "public concenience, interest, or necessity." A majority of the Commission, after a long and painstaking investigation, has concluded that the net result will be to give a larger choice to stations without sensibly diminishing the services of "chain broadcasting," which the report highly commended. We are asked to say that there is no reasonable basis for such a conclusion; to say that no reasonable person could find in the evidence any support for it. The industry at large holds conflicting views; the plaintiffs on the one hand believe that the prohibitions will in the end destroy "chain broadcasting" altogether; the Mutual Broadcasting System and a number of other interested per- Broadcasting System and a number of other interested persons think otherwise. Each side has stated its reasons and the Commission has chosen. It was created to make such choices because Congress believed that it would acquire in its special sphere a skill which courts could not match; and it is now hornbook law that the conclusions of such tribunals are not to be disturbed except in the plainest case. That

doctrine applies here with especial force just because the findings are necessarily prospective; time alone can decide their success or their failure. The measure of our power is to say whether there was any substantial evidence that the added freedom given to stations will outweigh the reduction in the opportunities which will remain open to the "networks." We cannot say that there was no such evidence. To take the regulation which is the head and front of the Commission's offending—3.104—it indeed does limit the power of a "network" to furnish large advertisers with the time of all its "affiliates," for it must always run the risk that after its last inquiry a station may have "sold" to another "network" the time which it proposed to "buy" of that station. On the other hand, it is certainly possible that the present contracts give the "networks" so strong a hold upon the industry as to keep down competition which would prove beneficial. Upon such an issue nobody who is not steeped in the details of the business is really entitled to an opinion, and indeed even the opinions of those who are so steeped must be largely speculation. But that does not mean that the industry must be left to itself; the Commission was created precisely to say how far it was best to let things stand, and how far to intervene.

There remains only the question of procedure: whether a motion for summary judgment is proper, or whether, as the plaintiffs argue, the causes should go to trial and be heard upon evidence taken *de novo*. That depends upon what effect we should give to the Commission's findings. If the plaintiffs intervened in a proceding by one of their "affiliates" for the renewal of a license, they could not compel the Commission to reconsider the findings of the report. As we have said, they had had adequate notice and full opportunity to be heard; indeed neither of the complaints alleges that they had not. Upon appeal to the Court of Appeals of the District of Columbia under §402(b), the whole record before the Commission upon the hearings which resulted in the regulations would be part of the record, and the only issues open would be whether there was substantial support for the findings in the record, and whether the findings were "arbitrary or capricious,"

§402(e). That record and those issues are before us here. The plaintiffs did not choose to wait and intervene, but adopted the alternative of an action in equity to "set aside" and "annul" the regulations as "orders." The reason that they have been allowed to proceed in this way is that the regulations inflicted a present injury upon them from which they were entitled to present relief; but the determining issues in each case are the same. Congress, having meant the validity of an order refusing a license to be determined as an appeal upon the record made before the Commission, cannot have meant to allow a larger scope of review because the Commission threatens for the same reasons to refuse all licenses.

This is confirmed by considering what use we could make of any evidence if we took it. It might go to show that the Commission had failed to give adequate notice to the plaintiff of what it proposed, or an adequate opportunity to put in their own evidence, or an adequate hearing upon all the evidence; but aside from the fact that the record is before us and does not bear out such a contention, neither complaint, as we have just said, alleges anything of the kind. On the other hand, if the evidence went to contradict or overthrow the findings, we could not bring it into hotchpot with the evidence taken by the Commission, without deciding the issues in the first instance ourselves. We have no such power; it would upset the whole underlying scheme of an expert commission, whose orders must stand or fall upon such evidence as it had before it. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420; *Acker* v. *United States*, 298 U. S. 426. If an aggrieved party wishes to supplement that evidence he must apply to the Commission itself, §405.

The plaintiffs somewhat faintly invoke the doctrine of *Crowell* v. *Benson*, 285 U. S. 22, *Baltimore & Ohio Railroad Co.* v. *United States*, 298 U. S. 349, and *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38. Assuming that that doctrine is still law (*Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573; S. C. 311 U. S. 570), it does not apply. The "networks" are indubitably engaged in interstate commerce and so are their "affiliates;"

it is a question of law, not of fact, whether the regulations are within the Commission's powers, and the only issue of fact, assuming it can be called such, is whether there was evidence to support the findings. Unless the distinction between what is jurisdictional and what goes to the exercise of a power is to disappear altogether, the Commission's jurisdiction did not depend upon whether they rightly estimated the "public convenience, interest, or necessity."

The complaints will be dismissed; and as there has been no trial, we need make no findings. As before, we will grant a stay, this time until February 1, 1943, or until the argument of the appeal in the Supreme Court, whichever is earlier. The same findings which we then made will serve with slight verbal changes. We are filing the judgments, the stays and findings along with this opinion.

Complaints dismissed.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16—178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Defendants*.

Order Dismissing Complaint.

Before L. Hand, C. J., and Goddard and Bright, D.JJ.

This cause came on to be heard at the October, 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof, it is

ORDERER, ADJUDGED AND DECREED that the complaint herein be, and the same hereby is, dismissed on the merits.

LEARNED HAND,
Circuit Judge.
HENRY W. GODDARD,
District Judge.
JOHN BRIGHT,
District Judge.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil 16—178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, *Plaintiffs*,

v.

THE UNITED STATES OF AMERICA, THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Defendants*.

Findings of Fact.

I. That if the Federal Communications Commission, pending the plaintiffs' appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; the plaintiffs will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public intrest.

IV. That a further delay in such enforcement of two and one-half months or until the appeal can be argued

whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiffs arising from enforcement, if the conditions mentioned in the First Finding exist.

That the plaintiffs are entitled to a stay pending their appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of February, 1943, whichever is earlier.

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J.

Decree Granting Temporary Restraining Order.

This cause came on to be further heard at the October, 1942, term of this court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the *status quo* pending an appeal by the plaintiffs to the Supreme Court, for the reasons appearing in the Findings of Fact filed herewith, it is

ORDERED, ADJUDGED AND DECREED that until February 1, 1943, or the argument of the appeal herein in the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1941, and which are known as "Order in Docket No. 5060."

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D J.

JOHN BRIGHT,
U. S. D J.